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CASES CITED

IN THE

Supreme Court of the United States

October Term, 1922

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners,

against

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

No. 177

On Writ of Certiorari to the Supreme Court of the State of Washington.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

Statement.

With this case is to be argued the case of *Ozawa* v. *United States*, Docket No. 1. There has been filed in the *Ozawa* case a brief prepared by the late Mr. Withington, in which there is a thorough discussion of principles wholly germane to the instant case. Counsel have, therefore, deemed it expedient, for convenience of reference, to reprint *in extenso* Mr. Withington's brief as a supplement to the brief prepared by them herein.

Supreme Court of the United States

October Term, 1922

No. 1

TAKAO OZAWA v. THE UNITED STATES.	*On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.*

BRIEF FOR PETITIONER.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Ninth Circuit, the case having come to that court, both on appeal and by writ of error, from a judgment denying the petition of said Takao Ozawa for citizenship.

At the trial in the United States District Court of Hawaii the United States District Attorney opposed the petition because Takao Ozawa, the petitioner, was of the Japanese race and born in Japan, and not eligible to citizenship under Revised Statutes, Section 2169. The other qualifications were proved, found to be fully established, and conceded by the Government. The certificate continues:

> "The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, High School, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have

attended American churches, and he has maintained the use of the English language in his home. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

"The court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization, and denied the petition, to which petitioner excepted."

Questions of Law Concerning Which the Circuit Court of Appeals Desires the Instruction of This Court.

1.

Is the Act of June 29, 1906 (34 Stat. at Large, Part 1, page 596), providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?

2.

Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?

3.

If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions really are two in number, and restated are:

1. Is the Act of June 29, 1906, complete in itself, and does it provide what it declares, "a uniform rule for the naturalization of aliens"?

2. If the Act of June 29, 1906, is limited by Section 2169 so that naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, *under any circumstances* eligible to naturalization?

Canons of Construction.

The solution of the questions certified to this court is, we apprehend, governed by:

1. The constitutional direction to Congress to establish an uniform rule of naturalization, and the co-ordinate public duty to enact plain and adequate legislation to carry out this provision.

2. The course of legislation. What Congress has done to establish this uniform rule.

3. The general scope of that legislation, and the declared policy of the United States in converting aliens into citizens, involving the whole field of legislation in reference to immigration as well as naturalization, and the ascertainment of the class of aliens Congress has determined to be fit for citizenship.

4. Does the Act of June 29, 1906, establish a uniform rule of naturalization and is it complete in itself?

5. Where a statute which has had an accepted meaning is re-enacted, should words of the re-enacted statute be taken in their hitherto accepted sense?

6. In determining whether words are to receive the accepted sense of the original enactment, or their meaning at the time when re-enacted, is the fact that the words,

taken in the latter sense, have no definite meaning, and that in judicial construction none has been found, persuasive that the meaning attached to them under the original enactment must be given?

7. Where the re-enactment purports to be a correction of an error in omitting the original enactment in a revision is this a further consideration for giving to the words their meaning at the time when originally enacted?

8. Should opinions of courts of inferior jurisdiction, although many in number, giving new constructions to the language of the re-enactment, be persuasive with the court, when based on no uniform rule, furnishing no common test, the rules in some cases based on race, in others on locality of origin, which test of locality and of race varies with the court, in determining a provision of law which deals simply with persons and with color, excepting so far as it applies to persons of African nativity and descent?

9. It should be assumed that Congress, in dealing with the great boon of citizenship in this land of the free and refuge of the oppressed, was frank and outspoken in its legislation and not sidestepping any difficulty or legislating by indirection where it feared to legislate directly.

10. The fact that the Japanese are a free people, that their root stock, like that of the Polynesian, is of the white race, and that while Mongolian and Malay types are found amongst the Japanese, the Caucasian or white type is as prevalent.

11. The question is not whether some or most of the Japanese can not be naturalized, but whether all Japanese even if of the Caucasian or white race can not be naturalized.

ARGUMENT.

I.

The Act of June 29, 1906, establishes a Uniform Rule of Naturalization, and that rule is not controlled or modified by Section 2169.

(a) The constitutional grant of power, the title of the act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization.

Article I, Section 8, of the Constitution of the United States provides:

> "The Congress shall have Power * * *
> "*To establish an uniform Rule of Naturalization* * * *
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * * *"

Chirac v. *Chirac*, 2 Wheat, 259;
Dred Scott v. *Sanford*, 19 How., 393;
Boyd v. *Nebraska*, 143 U. S., 135;
United States v. *Wong Kim Ark*, 169 U. S., 649;
Johannessen v. *United States*, 225 U. S., 227;
Luria v. *United States*, 231 U. S., 9.

Congress exercised this power in the first Congress, in the second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

> *"An Act to establish an uniform rule of naturalization."*

This Act was repealed by a like Act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

> *"An Act to establish an uniform rule of naturalization."*

This in turn became Title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

> "An Act *to establish* a Bureau of Immigration and Naturalization, *and to provide for a uniform rule for the naturalization of aliens throughout the United States.*"

This court has said in construing an Act defining its jurisdiction, which is derived from the Constitution:

> "The Constitution and the laws are to be construed together."
>
> *Durousseau* v. *United States,* 6 Cranch 307.

And of this very power this court said in the *Wong Kim Ark* case:

> "The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual."
>
> *United States* v. *Wong Kim Ark, ubi supra,* p. 703.

This Act purports to be a complete Act. It provides in Section 3 for exclusive jurisdiction of naturalizing aliens, and in Section 4,

> "that an alien may be admitted to become a citizen of the United States in the following manner, and *not otherwise,*"

followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, that the petition shall set forth

> *"every fact material to his naturalization and required to be proved upon the final hearing of his application."*

In Section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, is clear.

In re Brefo, 217 Fed., 131.

In a case in which it is held that the special provision as to naturalization in the Organic Act of the Territory of Hawaii (Act of April 30, 1900) was inconsistent with Section 4 of the Act of June 29, 1906, and therefore repealed, the court said:

> "The title of the Act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. * * * There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States."

United States v. *Rodiek,* 162 Fed., 469.

It is interesting to note that Judge GILBERT in this case speaks of Section 2169 (unrepealed) as a section "which extends the privilege of naturalization to aliens of African nativity and to persons of African descent."

> "By this legislation a new and complete system of naturalization was adopted, all of the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed."
>
> *Bessho* v. *United States*, 178 Fed., 245.

In a case holding that Section 2166 was not repealed it was said:

> "The Act of June 29, 1906, 34 St. at Large 596, commonly called the 'Naturalization Law,' was intended to provide a uniform system for the naturalization of aliens."
>
> *In re Leichtag*, 211 Fed., 681.
>
> "The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization."
>
> *In re Mallari*, 239 Fed., 416;
> *Hampden County* v. *Morris*, 207 Mass., 167; 93 N. E. 579; Ann. Cases 1912 A, 815.
>
> "Prior to 1906 'the Uniform Rule of Naturalization' authorized by the Constitution was found in the Act of 1802 (2 Stat. at L. 153, chap. 28), and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook, by the Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, sec. 963), to prescribe 'and fix a uniform system and a code of procedure in naturalization matters.' Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906."
>
> *United States* v. *Ginsberg*, 243 U. S., 472.

This case was cited in a recent case in which the court held that a certificate of naturalization issued without filing the certificate of arrival as provided in Section 4, subdivision 2, of the Uniform Act of June 29, 1906, was invalid, the court saying:

> "A 'uniform rule of naturalization' embodied in a simple and comprehensive code under Federal supervision was believed to be the only effective remedy for then-existing abuses. And in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the Code prescribed also the exact character of proof to be adduced."

United States v. *Ness*, 245 U. S., 319.

> "The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'
>
> "A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic, and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act."

United States v. *Peterson*, 182 Fed., 289, 291.

To recapitulate, the Constitution grants to Congress the power *"to establish an uniform Rule of Naturalization."* The various Acts of Congress which have exercised this power from the Act of the first Congress, March 26, 1790, have been and have purported to be Acts *"to establish an uniform Rule of Naturalization."* The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be

an exhaustive exercise of that power and is complete in itself.

(b) The unrepealed sections of Title XXX and a few other special acts provide for naturalization in cases excepted from the uniform law.

(1) *The decided cases so hold.*

Dealing hereafter with the effect of the Act of May 9, 1918, we observe that Section 26, the repealing clause of the Act of June 29, 1906, does not specifically repeal Sections 2166, 2169, 2170, 2171, 2172 and 2174 of Title XXX, and it has been uniformly held, although the application of the rule is not uniform, that while the Act of 1906 is a general act, as it did not repeal specific sections of Title XXX regulating the admission of special classes singled out for favor, the unrepealed portion stands covering these special cases.

In re Buntaro Kumagai, 163 Fed., 922;
In re Loftus, 165 Fed., 1002;
United States v. *Meyer,* 170 Fed., 983;
In re McNabb, 175 Fed., 511;
In re Leichtag, ubi supra;
United States v. *Lengyel,* 220 Fed., 720;
In re Sterbuck, 224 Fed., 1013;
In re Tancrel, 227 Fed., 329.

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary

were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified."

In re Loftus, ubi supra.

(2) *An examination of these sections confirms this view.*

Section 2166, a re-enactment of the Act of July 17, 1862, passed during the Civil War, provides for the naturalization of honorably discharged soldiers without previous declaration and with but one year's residence, instead of five provided by existing law.

There is a similar provision originally part of the Naval Appropriation Act of July 26, 1894, Chapter 165, (28 Stat. L. 125, revised in the Naval Appropriation Act of June 30, 1914, Chapter 130, 38 Stat. L. 395), providing for the naturalization of aliens who have served an enlistment in the United States Navy or Marine Corps, and have received an honorable discharge or an ordinary discharge with recommendation for re-enlistment, without previous declaration of intention, and by the latter act without proof of residence on shore, the honorable discharge or discharge with recommendation for re-enlistment to be accepted as proof of good moral character, the service under the Act of 1894 being for five years and that under the Act of 1914 for four years.

Section 2169, under discussion, is specifically limited in its application to Title XXX, of which it is a part.

Section 2170, not expressly repealed either by the Act of June 29, 1906, or by the Act of May 9, 1918, is *functus officio,* as its provisions are covered by the fourth paragraph of Section 4 of the former Act, and its requirement of residence for five years is inconsistent with Section 2166 above referred to and Section 2174, authorizing the admission, as citizens, or seamen having served three years on board a merchant vessel, providing that such

seamen after declaration of intention and three years' service shall be deemed citizens and for the purpose of manning merchant vessels and after the declaration, be deemed American citizens for the purpose of protection.

Section 2171 is a hoary relic forbidding the naturalization of alien enemies, with reservations for those who had made declarations before the 18th day of June, 1812, or were entitled to become citizens without declaration, and the further proviso reserving the right to apprehend and remove alien enemies.

The remaining section, 2172, naturalizes the minor children of persons duly naturalized without restriction as to residence and contains a further hoary provision against those legally convicted of joining the army of Great Britain during the Revolutionary War, and another provision making children of citizens, though born out of the United States, citizens.

When the questions were certified to this court, Title XXX applied to the Army, Navy, including the Marine Corps, to alien enemies, the children of persons naturalized and to seamen.

(c) Section 2169 is not restrictive in terms and if restrictive only applies to Title XXX, revised laws and the cases excepted from the general rule.

(1) ***The history of Section 2169 shows that it was an enlarging and not a restrictive clause.***

The Act of July 14, 1870 (16 Stat. L. 256, ch. 254), declares:

> "The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

When the Revised Statutes were enacted, the words of the existing naturalization statute, Act of April 14, 1802, were:

> "That *any alien, being a free white person,* may be admitted to become a citizen."

modified when incorporated in Section 2165 so as to read:

> "Section 2165. *An alien* may be admitted to become a citizen of the United States in the following manner, and not otherwise."

and the Act of July 14, 1870, was incorporated as a separate section, viz:

> "Section 2169: The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

When the Act to Correct Errors in the Revised Statutes (Stat. 1875, c. 18, v. 18, p. 318) was passed, attention was called to the omission of the words "being free white persons" in Section 2165, but instead of reinserting them in that section, Section 2169 was amended to read as follows:

> "Section 2169. The provisions of this Title shall apply to aliens (being free white persons and to aliens) of African nativity and to persons of African descent."

Section 2169 as originally enacted is an enlarging and not a restrictive declaration, and the introduction of the words "being free white persons and to aliens" does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to *restrict* naturalization to free white persons and Africans by this amendment. This inference, for it is nothing but an inference, is drawn entirely from the previous history of legislation and declarations on the floor of Congress, the uniform rule having previously provided only for the naturalization of "any alien being a free white person."

(2) *To hold otherwise naturalization from the passage of the Revised Statutes to the Amendatory Act of*

the 18th day of February, 1875, would be restricted to those of African nativity or descent.

If Section 2169 is restrictive then as originally enacted in the Revised Statutes it was restrictive and naturalization until the passage of the Act to correct errors was restricted to those of African nativity or descent, which is incredible.

(3) *The Chinese Exclusion Act of March 6, 1882, supports this view.*

Congress evidently took this view that the words were not restrictive and that affirmative legislation was necessary to exclude the Chinese from citizenship, for it passed the Act of May 6, 1882, which provides:

> "Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

This after it had been held that the language of Section 2169 excluded the Chinese.

In re Ah Yup (1878), 5 Sawy., 155.

And a half Indian.

In re Camille (1880), 6 Fed., 256.

(4) *In any event, Section 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906.*

It is not necessary to rest the argument on the ground just discussed, for Section 2169 is made applicable in terms only to Title XXX, of which the Act of June 29, 1906, is not a part.

To hold that Section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than

free white persons and those of African nativity or descent from words which contain no such prohibition, but also making a section which declares that *"the provisions of this Title shall apply"* to a restricted class of aliens, declare that the *provisions of the Act of June 29, 1906,* shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the Act into a restriction, but also incorporates into a general law, purporting to contain the entire uniform rule for naturalization, a provision which is in, and restricted in terms to, a title in another Act, which Act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain Section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in Title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted, excepting as provided in that Act. These conclusions, drawn from the general scope of the Act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the terms used in the previous general Acts, omitting the words "being a free white person."

> "Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise.*"

and then prescribes *all* the conditions of admission and provides for a petition setting forth *"every fact material to his naturalization and required to be proved,"* this form given for the petition containing no fact to show that the applicant is a free white person or that he is of African nativity or African descent.

(d) The origin of the Uniform Act of June 29, 1906, shows that it was intended to be a complete scheme for naturalization, the test being "Fitness for citizenship" with no discrimination against Japanese.

The initiatory step in the legislation was an executive order issued in March, 1905, appointing a Commission composed of an officer from the Department of State, Gaillard Hunt, from that of Justice, M. D. Purdy, and from Commerce and Labor, Richard K. Campbell, who submitted a report transmitted to the 59th Congress by President Roosevelt, who, in his annual message at the opening of the session, December 5, 1905, announced the appointment and referred to this Commission and called attention to the recommendation "as to the importance of revising by appropriate legislation our system of naturalizing aliens" (Congressional Record, vol. 40, part 1, p. 99). The same message also dealth with the subject of immigration, the President saying:

> "The prime need is to keep out all immigrants who will not make good American citizens."

and again:

> "In dealing with this question it is unwise to depart from the old American tradition and to discriminate for or against any man who desires to come here and become a citizen, save on the ground of that man's *fitness for citizenship.* It is our right and duty to consider his moral and social quality. His standard of living should be such that he will not, by pressure of competition, lower the standard of living of our own wage-workers; for it must ever be a prime object of our legislation to keep high their standard of living. If the man who seeks to come here is from the moral and social standpoint of such a character as to bid fair to add value to the community he should be heartily welcomed. We can not afford to pay heed to whether he is of one creed or another, of one nation

or another. We can not afford to consider whether he is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, *Japanese*, Italian, Scandinavian, Slav, or Magyar. What we should desire to find out is the individual man. In my judgment, with this end in view, we shall have to prepare through our own agents a far more rigid inspection in the countries from which the immigrants come. It will be a great deal better to have fewer immigrants, but all of the right kind, than a great number of immigrants, many of whom are necessarily of the wrong kind. As far as possible we wish to limit the immigration to this country to persons who propose to become citizens of this country, and we can well afford to insist upon adequate scrutiny of the character of those who are thus proposed for future citizenship" (p. 101).

and again:

"The questions arising in connection with Chinese immigration stand by themselves" (p. 101).

It will be observed that in this message, while the subject of Chinese immigration is dealt with at length and is said to stand by itself, it is expressly declared that there should be no restriction on *Japanese* immigration and that immigration should be limited as far as possible to future citizens, and the immigration restricted and scrutinized, with this requirement in view. In the proceedings in Congress there is no indication that Japanese were to be discriminated against either as to immigration or citizenship.

(e) This policy announced by President Roosevelt has been steadily followed in legislation in respect both to naturalization and immigration including the Act of 1917.

These Acts show that the policy of Congress is to exclude undesirable citizens and the Chinese and that

Congress has refrained with great care from any action tending to place Japanese in the same class with Chinese.

(1) *These Acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.*

Immigration precedes naturalization in natural and logical order. The same reasons which tend to restrict one operate on the other.

Up to the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged; the alien Act of June 25, 1798, the one exception, was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That Act "has ever since been the subject of universal condemnation" (Mr. Justice FIELD in *Fong Yue Ting* v. *United States*, 149 U. S., 868).

Since the Revised Laws, various Acts have limited immigration, culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of alien persons under sentence for felonious crimes other than political.

By Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes, paupers, persons suffering from a loathsome or dangerous contagious

disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements in the Act of June 29, 1906, shows that Congress excluded from naturalization the same classes denied admission under the immigration law, with the exception of those suffering from physical infirmities, requirements against physical infirmities acquired in this country not being applicable to naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion Acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), October 1, 1888 (25 Stat. L., p. 504), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter Acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other nationality than Chinese. To these can be added the Acts of April 28, 1904 (33 Stat. L., 478), and June 23, 1913 (38 Stat. L., 4.).

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31

Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the Commissioner General the enforcement of the Chinese exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons, and the 36th section of the Act of March 3, 1903, contains this provision:

> "Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of Chinese persons or persons of Chinese descent."

Inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

> "The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."
>
> *United States* v. *Wong You*, 223 U. S., 67;
> *In re Dow*, 213 Fed., 355.

Against this long line of statutes we place the fact that there is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese or to discriminate against the Japanese in any way. We have traced the course of legislation along these two parallel lines and endeavored to show that the legislative mind ran in the same course, with no trace of intention to exclude the Japanese from admission or from naturalization.

The apparent exception in the Acts forbidding the importation of coolies (R. S., Secs. 2158 to 2163), originally enacted February 19, 1862 (12 Stat. L., 340), and the Supplemental Act of March 3, 1875 (18 Stat. L., 477), are but a prelude to the contract labor legislation beginning with the statute of February 26, 1885, and now found

in the general Immigration Act of February 24, 1907 (34 Stat. L., 898), making it a misdemeanor to import contract labor, which covers the ground of all the earlier Acts.

This court in a recent case, in reviewing the history of the immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States.

Lapina v. *Williams*, 232 U. S., 78.

"That congress has never contemplated or intended to confer the right of naturalization upon Mongolians, *or natives of China*, is palpable by a mere reference to the laws upon the subject of naturalization. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

" 'The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent.'

"Mongolians, *or persons belonging to the Chinese race*, are not included in this act. This was the view held by Judge SAWYER, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

" 'Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended, by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress.' "

"But if there could be any question as to the meaning of the provision above referred to with

reference to Mongolians, the matter is settled and concluded by the imperative and unmistakable language of the act of congress of May 6, 1882, which says:

"'Hereafter no state court or court of the United States shall admit Chinese to citizenship.'

"That such is the law of the land and the policy of this country is explicitly recognized by article 4 of the convention between the United States of America and the empire of China, which was duly signed and ratified, and, on December 8, 1894, proclaimed by the president. This article provides:

"'In pursuance of article 3 of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * * '"

In re Gee Hop, 71 Fed., 274-275.

(2) *The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The immigration Act of February 5, 1917, and the discussion of the bill in Congress show no intention of placing the Japanese in a class with the Chinese. Japan is expressly excepted from its provision by a territorial limitation, done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266). As it came from the House, that bill, while making some small changes in excluded persons, particularly those afflicted with tuberculosis,

was chiefly marked by two additional grounds of exclusion: one, the provision for which three presidents of the United States had vetoed similar Acts,—the requirement that aliens over sixteen years of age, physically capable of reading, unable to read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

> "Hindus and *persons who can not become eligible, under existing law, to become citizens of the United States by naturalization*, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may hereafter be entered into" (Congressional Record, p. 164).

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, Dec. 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

> " * * * unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States." [Sec. 3.]

Numerous amendments were offered to this clause. The southern senators endeavored to exclude immigration of Negroes, particularly from the West Indies; the members from the Pacific coast to exclude the Orientals. All amendments were voted down, the west not voting with the south on the Negro, and the south not voting with the west on the Asiatic.

There are frequent tributes in the debate to the Japanese nation; among others that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

> "As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)
>
> "I have never claimed, neither do the people of the Pacific coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)
>
> "The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)
>
> "There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.
>
> "* * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies.
>
> "You stand around and smile and risk international complications with Japan on a race issue

about the Japanese, who are as highly civilized as you are.

"* * *

"The Japanese are not a race of barbarians; they are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

> "The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who can not become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

but he goes on to say that this form of words was extremely offensive to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not eligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted law) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

> "Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234);
> "that is not defined" (p. 334).
>
> "Mr. Phelan. The Japanese claim that they are white persons; the Hindus claim that they are

white persons. It is a very dangerous proposition."

"Mr. Lodge. Yes; they claim it, but it has not been so held. *I think it is a danger involved in the naturalization law*, which is the foundation of the *whole thing*" (p. 234).

"Mr. Lodge. Nobody has ever claimed that Mongolians were of the white race."

"Mr. Phelan. The Japanese dispute that they are Mongolians."

"Mr. Lodge. They may do so, but it has never been held by our courts that they were white" (p. 235).

"Mr. Nelson. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race'? Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?"

"Mr. Lodge. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the Conference Committee the phrase "white persons" was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision in reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Japanese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the

Acts which are not repealed, altered or amended by this Act are all Acts relating to the immigration or exclusion of Chinese, among which Acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

(f) Any other construction would be violative of the existing treaty with Japan.

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849),

> "the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty of March 21, 1895, is the stipulation that the rights given

> "do not in any way affect the laws, ordinances and regulations with regard to trade, *the immigration of laborers,* police and public security which are in force or which may hereafter be enacted in either of the two countries."
>
> *Yamataya* v. *Fisher,* 189 U. S., 86.

while the Chinese treaty of December 8, 1894, provided that Chinese

> "either permanently or temporarily residing in the United States, shall have, for the protection of

> their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

(g) The Act of May 9, 1918, amending the uniform naturalization law of June 29, 1906, tends to support the view that Section 2169 is only restrictive of Title XXX of which it is a part.

The Act of May 9, 1918, does three things: it amends Section 4 of the Act of June 29, 1906, by adding seven new subdivisions numbered seven to thirteen; it repeals certain Acts so far as covered by these seven subdivisions; it validates all certificates of naturalization upon declarations of intention filed prior to September 27, 1906, and it incidently rectifies an error in the original Act in reference to the District of Columbia.

The first of these new subdivisions numbered "seventh" is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican. It provides that the native-born Filipino of required age who has made his declaration of intention, after service of not less than three years in the Navy, Marine Corps or Naval Auxiliary Service and has an honorable discharge or discharge for re-enlistment may

> "on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision, it is shown that such residence can not be established";

while "any alien, or any Porto Rican not a citizen of the United States" of the required age who has enlisted in *any* of the branches of the army or militia, Navy or

Marine Corps or Naval Auxiliary Service, or the Coast Guard, without restriction as to length of service provided that he has re-enlisted, been re-appointed, or has an honorable discharge or furlough to the Army Reserve or the Regular Army Reserve or has served three years on a vessel of the United States Government or a merchant or fishing vessel of more than twenty tons burden, may be so naturalized; while "any alien" serving in the military or naval service during the war may be naturalized without preliminary declaration or proof of residence; and any alien, who has served in the army or navy or *Philippine Constabulary,* been honorably discharged and entered military or naval service may be naturalized on three years' residence either in the United States, Philippine Islands or Panama Canal Zone, and petitions may be filed at the most convenient court either by an alien or a person owing permanent allegiance to the United States, who comes within the subdivision, and may be heard immediately; the alien but not the person owing allegiance may file his petition without personal appearance and without fee, but the poor Filipino, inhabitant of the Canal Zone or Porto Rican not a citizen, apparently has to appear in person and pay his fees. This section appears to make distinctions between the Filipino in the Naval and Marine Corps and the Army, and between the alien and the person owing allegiance to the United States, on lines which are not at all clear.

Sudivision "eight" re-enacts the Seaman Act; "ninth" provides for instruction in citizenship; "tenth" disposes of the declaration of intention in certain cases of misinformation; "eleventh" modifies the provision for the naturalization of alien enemies so that the declaration of intention must be made two years prior to the existence of the state of war and provides further security against fraud in the naturalization of alien enemies; "twelfth" for the resumption of citizenship by persons in the mili-

tary service of the allies; and "thirteenth" provides for service in the military or naval forces of the United States wherever they may be, to be construed as residence in the United States.

The repealing section is obscure. Section 2166 is repealed excepting as to aliens prior to January 1, 1900, serving in the armies and with a discharge, also Section 2174, a portion of the Naval Appropriation Act of July 26, 1894, the like Act of June 30, 1914, and a portion of Section 3 of the Act of June 25, 1910, are repealed; excepting for the purpose of prosecuting for offenses, and the Act continues:

> "That all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined."

There is no "seventh" subdivision of *this* Act unless it is that entitled "thirteenth" relating to continuous residents within the United States, but if the seventh subdivision of Section 4 of the Act of June 29, 1906, is referred to, there is nothing "specified" in that subdivision in reference to Section 2169 and there is no "limitation therein defined" of Section 2169, which is neither "repealed nor in any way enlarged" by that subdivision, or for that matter by any part of the Act itself, unless the contention made in this brief is to be sustained. If the effect of taking special cases of soldiers and sailors out of Title XXX and putting them into the Uniform Act of June 29, 1906, takes them out of the limitation of Section 2169, then, although that section is not repealed or for that matter enlarged, it no longer has any application, and in that sense the change is specified and the limitation defined.

II.

The point that Section 2169 enlarges and not restricts Title XXX of the Revised Laws, has never been adjudicated in any true sense, and the point that Section 2169 does not resrict the Uniform Act of June 29, 1906, but is confined by its terms to Title XXX, has never been adjudicated at all.

(a) No court excepting Judge Lowell, *in re Halladjian*, has taken into consideration what the section plainly says.

No judge and no court has ever analyzed this section in connection with Title XXX, excepting Judge FRANCIS C. LOWELL, who said:

> "Rev. St. 1873, Sections 2165-2168, omitted mention of 'free white persons,' thus opening naturalization to all aliens. Notwithstanding this universal inclusion, yet the special inclusion of Africans made by the act of 1870 was expressly, though needlessly, continued in section 2169, as follows:
>
> " 'The provisions of this title (Naturalization) shall apply to aliens of African nativity and to persons of African descent.'
>
> "The intent of Congress in passing section 2169 in its original form was to insure by express inclusion the right of Africans to be naturalized like all other persons. By Act February 18, 1875, c. 80, 18 Stat. 318, passed 'to correct errors and to supply omissions in the Revised Statutes,' section 2169 was amended to take its present form, thus again limiting naturalization to (1) free white persons, and (2) Africans within the act of 1870. The broad phrase 'any alien' was left unchanged in sections 2165-2168, and its meaning therein was defined and cut down by section 2169. This is the most reasonable construction of section 2169 in its

present form. To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, Sec. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese."

In re Halladjian, 174 Fed., 834.

But this was not necessary to the decision, for the point decided in that case is that an Armenian is a white person.

As a matter of fact, the opinions, from that of Judge SAWYER down, are based on the debates in Congress and not on the language of the provision. In the debate in 1870 the Chinese alone were referred to, and at that time the words "being a free white person" in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms.

Pennsylvania R. Co. v. *International Coal Min Co.*, 230 U. S., 184.

And beyond the reports of the committee, this court will not go.

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out."

Lapina v. *Williams, ubi supra.*

No court other than Judge LOWELL has ever considered the language of the section, has ever taken into consideration the fact that the amendment was not made

to Section 2165 where, if intended to be restrictive as in the earlier law, it belonged, but to 2169, which was originally and still continues to be a broadening and not a restricting clause, but all these decisions, as we have said, are based on a pure supposition of what Congress intended to do, based on remarks of Mr. Poland and the desire of the western coast to exclude Chinese, which California evidently did not consider was safely done until the passage of the Exclusion Act of 1882.

(b) No court has ever passed on the point that Section 2169 is confined in terms to Title XXX of the Revised Laws.

The only question which has been adjudicated is whether Section 2169 is repealed, and it has been held that as Section 2166 is not repealed and would be governed by Section 2169, the Act of 1894 being similar, it restricted that Act also.

Bessho v. *United States, ubi supra.*

United States v. *Balsaro, ubi supra,* is a little nearer in language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of Section 2169 is *obiter dictum.* The Act of June 29, 1906, is assumed to be a part of Title XXX of the Revised Statutes of the United States. The requirement that the petition should set forth all material facts is not referred to, and what is said about the statement as to color in the declaration of intention, overlooks the requirement that color is shown "as a visible distinctive mark" to identify the petitioner for naturalization, and is not required to be set forth in the petition as one of the material facts.

In re Alverto, 198 Fed., 688, a doubtful decision, merely cites *United States* v. *Balsaro,* as authority to the point.

Summing up these cases, the *Bessho* case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and the Act of July 26, 1894, which is said to be similar to Section 2166, which is not repealed, and, being a part of the title, would be controlled by Section 2169. What is said in the *Balsaro* case is *dictum* of the hasty and ill-considered sort; and THOMPSON, *District Judge,* in the *Alverto* case does not discuss the point, simply citing the *dictum* in the *Balsaro* case as decisive. In the *Alverto* case the petitioner relied on the Act of July 26, 1894, being the excepted classes, but also claimed under Section 30 of the Act of June 29, 1906.

III.

Section 2169, if applicable to the Act of June 29, 1906, must be construed as meant in the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro, which does not exclude Japanese.

(a) Section 2169, if considered as a re-enactment of the earlier law, is to be construed in the light of, and with the meaning of the original Act of March 26, 1790.

> "* * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365."
>
> *McDonald* v. *Hovey,* 110 U. S., 619;
> *In the matter of Kang-Gi-Shun-Ca.,* 109 U. S., 556;
> *Crenshaw* v. *United States,* 134 U. S., 99.

> "The reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."
>
> *United States* v. *Le Bris*, 121 U. S., 278.

There must be something clearly showing an intention to change the law.

> *United States* v. *Ryder*, 110 U. S., 729.

The construction is with reference to the original Act.

> "This rule has been repeatedly applied in the construction of the Revised Statutes."
>
> *Hamilton* v. *Rathbone*, 175 U. S., 414.
>
> "The meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization Act of 1790."
>
> *Ex parte Shahid*, 205 Fed., 812.

(b) So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counter distinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, Article I, Section 9, provided that

> "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."

which provision was universally understood to be aimed

at the abolition of the slave trade after that date. It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this Act, was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson.

> *In re Dow,* 213 Fed., 355, 365;
> *Dow* v. *United States,* 226 Fed., 145.

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles Follen became the first instructor in German in any college at Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (Americana Vol. 1, Anthropology.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

> "They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted." (Legislative History of Naturalization by Franklin, p. 40.)

In the same debate, Page of Virgina held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent States from forcing undesirable persons on other States, and that Congress would not compel the reception of immigrants likely to be chargeable to a State. (*Idem*, p. 38.)

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the alien Act of 1798, and the revision of the laws on the subject of naturalization:

> "Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?" (*Idem*, p. 97.)

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race "is not an easy working test of 'white' color as required by Section 2169," continues:

> "Section 2169, however, makes no mention of race or of racial discrimination. 'White persons' are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of

the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattoes, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified."

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat., 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by

'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat., 428; 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., Sect. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, Sect. 9, 25 Stat., 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. XCIV. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sect. 7, 30 Stat., 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the Chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p.17, c. 17, Sect. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, sub. 4 (Code 1904, Sect. 1294d); Civ. Code S. C. 1902, Sect. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, Sect., 1231; Ky. St. 1909 (Russell's), Sects. 5607, 5608, 5642, 5765 (Ky. St. 1909, Sects. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (Article 23, Sect. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern

itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

In re Halladjian, ubi supra.

(c) "White person," as construed by the Supreme Court of the United States and by the State Courts, means a person without negro blood.

This was so held by the Supreme Court of the United States in construing Section 2154 of the Revised Statutes, and it was held

> "that Congress meant just what the language used conveys to the popular mind."
>
> *United States* v. *Perryman,* 100 U. S., 235.

namely, a person not a negro.

We shall give, in connection with citations from the dictionaries, a reference to the numerous States which have used the expression "white person" to distinguish a person who had no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the States are reviewed by Chief Justice TANEY

in *Dred Scott* v. *Sandford*, and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several States," and the naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

> "The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."

Dred Scott v. *Sandford*, 19 How., 393, 420.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be.

Du Val v. *Johnson*, 39 Ark., 182, 192.

(d) The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.

White is defined in the Standard Dictionary as

> "1. * * * opposed to *black*. * * *
>
> "2. Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race: op-

posed especially to *negro*, but often to the yellow, brown, or red races of men."

The Century defines white as

"1. * * * The opposite of *black* or *dark*.

" * * *

"6. Square; honorable; reliable, as, a *white* man. (Slang, U. S.)"

Webster defines it as

"1. The opposite of *black* or *dark* * * *"

and defines a white person as

"a person of the Caucasian race (6 Fed., 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as

"1. Any person of the Eurafrican race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different States, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is a white person who has just less than half negro blood in his veins."

Webster's New International Dictionary.

"In various statutes and decisions in different States since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michi-

gan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

(e) The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning.

In 1790, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change, not only in this country, but in the world. Slavery had been abolished in 1865 by the thirteenth amendment, and, as Dr. Francis Wharton used to say, before the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

Giving the words "free white persons" their common and popular acceptation in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded.

(a) Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming.

Up to 1875 few Japanese immigrants had entered America. In the decade of 1861-70, the immigration reports show that two hundred and eighteen arrived; in the next decade the number fell off. Exclusive of students, probably there were not fifty Japanese in the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, of an entirely different character from the present Japanese immigration, of single men who did not come to establish homes; the women imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and decisions Mongolians and Chinese.

(b) Judicial construction of the phrase up to 1875, does not sustain such an exclusion.

We have already cited the *Dred Scott* and *Arkansas* cases. There is little of judicial construction to be found. The Act was before the courts in New York and construed in an ably argued case, in which the Vice-Chancel-

lor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 that America was indebted to emigration for its settlement and prosperity, showed that the policy was to encourage emigration, and "to bestow the right of citizenship freely, and with a liberality unknown to the old world."

Lynch v. *Clarke,* 1 Sandf., 583, 649, 661.

Amongst the state Acts discussed are two in which it appears that Virginia amended a statute of May, 1779, Chap. 55, which limited citizenship to *free white persons,* in 1792 to include *"all free persons"* (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the California Act of April 16, 1850, providing that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate 'the whole of the Mongolian race,'"

> "that 'White' and 'Negro' are generic terms, and refer to two of the great types of mankind."
>
> "and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."
>
> *People* v. *Hall,* 4 Cal., 399, 404.

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People* v. *Hall* must be followed,

> "we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision."

and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element.

People v. *Elyea*, 14 Cal., 145.

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of Africa and their descendants, and then he suggests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and

> "Perhaps there *might* be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law."
>
> 2 Kent's Comm., p. 72.

(c) No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875.

It has been held by this court that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882.

Low Wah Suey v. *Backus*, 225 U. S., 460.

A more accurate statement than the earlier one by Chief Justice FULLER, commented upon by Judge LOWELL,

> "That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."
>
> *In re Ah Yup, ubi supra.*

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang*, 84 Cal., 163); that a Burmese, being a Malay, "who under modern ethnological subdivisions are Mongo-

lians," is not eligible (sic.) (*In re San C. Po,* 28 N. Y. Supp., 383); that it "includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto, ubi supra*); "The Caucasian race only" (*In re Akhay Kumar Mozumdar,* 237 Fed., 115).

> "Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?"
>
> *In re Dow,* 213 Fed., 355.
>
> "It would not mean Caucasian."
>
> *Ex parte Shahid, ubi supra.*

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons.

> *Dow* v. *United States,* 226 Fed., 145.

It would include a Parsee.

> *United States* v. *Balsara, ubi supra.*

It would not include a half white and half Indian, because not of the Caucasian race.

> *In re Camille, ubi supra.*

Speaking of the section, Judge LOWELL, from whom we have already quoted, sums up the whole matter:

> "That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely

brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied upon section 2169 without making distinctions which Congress certainly did not intend to draw; *e. g.*, a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169."

In re Mudarri, 176 Fed., 465 .

In cases dealing with Japanese, Judge COLT held *In re Saito*, 62 Fed., 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge HANFORD holds that Japanese are excluded because of

> "the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

In re Buntaro Kumagai, 163 Fed., 922.

He does not say what race the Japanese belong to, nor what race is predominant.

In the *Bessho* case Judge GOFF would seem to exclude

Japanese because "all alien races except the Caucasian are excluded," and Judge CHATFIELD because

> "A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized."
>
> *In re Knight*, 171 Fed., 299.

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race (*In re Yamashita*, 30 Wash., 234, 70 Pac., 482); the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians!* (*In re Kanaka Nian*, 6 Utah, 259, 21 Pac., 993); Judge MAXEY admitted a copper-colored Mexican, who apparently was an Indian of unmixed blood, holding that Judge SAWYER's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch* v. *Clarke, ubi supra*, as to the liberal policy (*In re Rodriquez*, 81 Fed., 337). Judge MAXEY cites the Acts establishing territorial government for New Mexico and Utah, each of which use the expression "free white" to describe those entitled to vote, but which in the same section clearly recognize, as included in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which

makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in State and Federal Courts.

In fact, the census of 1910 shows 209 American born citizens, 420 naturalized, and 389 with first papers, who are Japanese.

> American Democracy and Asiatic Citizenship (Gulick), p. 185.

(d) Such exclusion is inconsistent with friendship of America with Japan.

It is unnecessary to say anything upon the warm friendship of Japan toward America and America toward Japan from the time the hermit nation was opened up by Commodore Perry. Japan looked upon America as her friend and type until she was rudely awakened by the attitude of the United States Government during the Russo-Japanese war and events in California. The world war has contributed, however, to restore the relationship which existed unimpaired for half a century.

The feeling of the United States before the passage of the Act of 1906 is shown in the Annual Message of President Cleveland of 1894, who says (Message and Papers of the President, Vol. 9, p. 529):

> "Relations with this progressive nation should not be less broad and liberal than with other powers."

The announcement of what was really the admission of Japan to the family of nations by the treaties of 1899 in President McKinley's message of December 5, 1899, and the special message of President Roosevelt, December 18, 1905, confirm this.

The feeling of the Japanese towards America is nowhere better expressed than in the preface and the first chapter of Kawakami's remarkable book on "Japan in World Politics."

V.

The words "Free White Persons," neither in their common and popular meaning, nor in their scientific definition, define a race or races or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States.

(a) The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law, it means a freeholder as distinguished from a serf. Under the Constitution, it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. It imports a freeman, a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

(d) "Person" is "a living human being; a man, woman or child; an individual of the human race" (*U. S.* v.

Crook, 25 Fed. Cas., 695). The provisions of the 14th amendment in reference to persons "are universal in the application to all persons within the Territorial jurisdiction without regard to any difference of race, or color, or nationality" (*Y. Wo* v. *Hopkins*, 118 U. S., 369). The same rule has been applied to include aliens under the 5th and 6th amendments (*Wong Wing* v. *U. S.*, 163 U. S., 235).

(e) No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the construction as the word "white." Nearly all think the section deals with *races*.

VI.

The question certified is whether all Japanese as a people are excluded from naturalization which would exclude a "person" who is "free," who is "white," because he is a Japanese.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race. No argument can accentuate this point more strongly than the mere statement of it.

VII.

The Japanese are "free." They are, or at least the dominant strains are "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

> *"Of one blood hath He made all nations,"* says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that
>
> "Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the Britannica say, referring to the term Caucasian:

> "The ill-chosen name of Caucasian invented by Blumenbach * * * and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races."
>
> 2 Enc. Brit., p. 113.

On the other hand, Cuvier divides the races into Caucasian, Mongol and Negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic

("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").

2 Enc. Brit., p. 113.

but that work adds, page 114,

> "The doctrine of the unity of mankind stands on a firmer base than in previous ages."

and Volume 9, Enc. Brit., p. 851, includes in the Caucasian race certain of the Brown Polynesian races, including Hawaiians and the Ainus.

In "Man, Past and Present," Professor A. H. Keane, F.R.G.S., in the "Cambridge Geographical Series," describes mankind under four leading types, which may be called black, yellow, red, and white, or Ethiopic, Mongolic, American and Caucasic. He distinguishes Mongolians into three kinds: Northern, Southern and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

> "Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Maygars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white*" (p. 266).

The Encyclopaedia Britannica, Vol. 11, p. 635, commenting upon Professor Keane, says:

> "The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, hereafter quoted, referring to the fact that "Every human being is a mixture of root stocks," in a letter says:

> "It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American missionary (except the complexion and colour of the eyes) and this type is fairly common in East-central Europe.
>
> "The preservation of a conventional racial type is a matter of aesthetics. What really counts in humanity is home influence and education, and where the ideals are high, the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can, and would be glad to make an examination. The head form and facial indices would suffice."

It is common observation that the women of the Kyoto region in Japan, particularly the higher class, are white, not darker than many of the women of this country. The Ainu, an admitted Caucasian, is the darker. The influence of climate and habit has much to do with the matter of complexion. Ellis, in his Polynesian Researches, speaking of color, says that Polynesian infants are born little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative and perhaps the only governmental expression on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and parallel rivers to the lake of Argueen; then following the river of that name which arises from the lake, he thinks they reached the Amoor, following the valley of which they would find themselves in the then uninhabited peninsula of Korea, on the eastern shores of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

and speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that, 'the women who protect themselves from the influence of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.'"

"In general the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which white assume as their own privilege." (Ratzel's History of Mankind, Vol. 3, p. 454.)

Ratzel, after referring to the fact that the lower classes are darker, says:

> "Japanese, however, sees the ideal of his breed in fair skin, dark sleek hair and slender figure."

He quotes a story from Broca to show the similarity in appearance between the Brazilian and the Japanese.

Woodruff, in his "Effect of Tropical Life on the White Race," is struck by the fact that Japan is a counterpart of Great Britain, and Dr. Brown, from whom we will quote, has emphasized this in enforcing his view that the dominant races of man are maritime and that to make a great maritime people requires a high proportion of broken coast line to the area of the country, and preferably islands running north and south with a variety of climate.

Other authorities have sought to account for the mental alertness of the Japanese, a quality of mind in which they differ from other Asiatics and resemble the Europeans and the inhabitants of North America above the Mexican line. The Japanese are commonly called "The Yankees of the Orient," and they show no marks of the degeneracy common in the mixture of non-assimilable races. Doctor Baelz of the Imperial University of Tokyo is quoted by Kawakami in "Japan in World Politics," p. 112, upon this point, which has been with him a subject of research.

The history of the people who inhabit the islands of the Pacific has not yet been written, and even the standard authorities fail us as to their origin and affinities. The most reliable authority on Polynesia is Dr. J. Macmillan Brown, Vice Chancellor of the University of New Zealand, and on Japan, Dr. N. Gordon Munro, and a better understanding of these peoples can be had from their recent work than from any other source.

Some conclusions are now fairly well demonstrated: that the Polynesians are a Caucasian race speaking an

Aryan tongue, springing from the earlier Mediterranean race and allied to the later Baltic peoples of Europe; that a great nation once inhabited a continent now submerged in northwestern Polynesia, of which the capital was Ponape, in the Carolines—the stone remains showing an ancient city of 100,000 inhabitants, perhaps the fabled Hawaiki of the Polynesians; that the root stocks of the Japanese people are the Ainu in the north and the Yamato in the south, each Caucasian, the latter of the Mediterranean stock; that there was probably a palaeolithic as well as a megolithic invasion of Polynesia from Japan; that affinity is shown by the linguistic attitude of the Polynesian people which faces towards Japan; in the patriachate or headship of the father as against the matriachate; in its vocabulary and phrenology; again, from the location of the Polynesian spirit land or Hawaiki, for as the soldiers today at the Western front speak of the dead as "going West," so the souls of the departed Polynesians were said to have "gone West"; and finally by the maritime character of these people, for the Mongolian is primarily a landlubber, while the Japanese and the Polynesian are daring lovers of the seas.

Dr. Brown, in a paper delivered before the Hawaiian Historical Society, September 5, 1918, says that,

> "The phonology of the Polynesian dialects differs by the whole world from that of all the languages to the west of it * * * There are only two languages in the Pacific Ocean which have the same phonological laws, the Japanese to the northwest and the Quichua to the southeast * * * The range of sounds in Japanese is nearly the same as in Polynesian."
>
> "In fact, as Fornander points out, the primitive Aryan language must have had exactly the same range of consonants as Polynesian, and though the process was not carried so widely among the vowels, the decadence and interchange of consonants had begun. The homeland of the primeval Aryan

> is now accepted as in Europe between the Baltic and the Black Sea, and that was a cold region in which the organs of speech were capable of difficult consonantal sounds; whilst the environment of Polynesian after it reached the Pacific was tropical and exactly suited to the decay of the consonants."

and again:

> "The primeval Aryan languages must have traveled from Europe west of the line between the Baltic and the Black Sea through Asia, long before Sanskrit began its long migration into India or even began its elaborate inflectional system."
>
> "The linguistic attitude of Polynesia faces north towards Japanese and Ainu, which have got no such restriction on their use of nouns and numerals. That the Polynesian vocabulary looks also to some extent in that direction will be apparent from a few examples."

In his "Maori and Polynesian," Dr. Brown, in addition to proving that the Polynesians spoke an Aryan tongue and were of the Caucasian race, springing originally from the north of Africa, on the shores of the Mediterranean, thence migrating to the Baltic, and through southern Siberia, Lake Baikal, Korea and Japan, the megalithic track continued into Polynesia by a course involving much less sea than in the present age, when a large portion of Polynesian continent has subsided (pp. 3-5, 26, 27, 38, 59, 118, 252 and 253), points out the resemblance to the Japanese in maritime skill and love of the sea (p. 7), which is essentially Caucasian and not a trait of the Negroes or Negroids, Mongols or Mongoloids, that the route through Japan and Polynesia is the dolmen route, that the Japanese and Polynesians show affinities in art, in sports and in other habits of life (pp. 49, 50, 201 and 265), and that Polynesia affiliates with Japan in the patriarchate or father-headship as against the matriarchate or mother-right (pp. 38 and 250).

Dr. Munro, with Dr. Baelz's work as a basis, and much new material on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, in a paper before the Asiatic Society of Japan, at Keio University, March 21, 1917, dealing with the two root people, the Ainu and the Yamato, particularly with the Yamato, says:

> "In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having also a birthright, if not as the prior autochthones of Japan * * *"

He then goes on to say:

> "* * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall follow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of magalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *"

finding the immediate source of this culture in

> "Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

where he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

> "We must, however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe,* which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomorphic concept in the sun in almost every land (Egypt perhaps excepted) conventialised from the biped concept as a sign of mankind."

and after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes:

> "But it is not necessary to suppose that this 'Horse-back domination' ever came into close contact with the Chinese before settling in Korea.
>
> "Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings."

and says there is something maritime in the character of the people of allied culture, and tracing this course he continues:

> "This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine round the Black Sea and between it and the Caspian, in the Caucasus and southern Russia whence it spread into Siberia in a mitigated form. It also entered Arabia, Mada-

> gascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

after which he still further concludes that it is maritime, referring incidentally to the remains before referred to on the Island of Ponape, described by Christian in his book on the Carolines, and says:

> "* * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.
>
> "Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age."
>
> * * *

and in conclusion says:

> "My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.
>
> "The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chi-

nese civilization had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was inconsiderable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race. I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the South and noticeably in the North; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in conjunction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the Immigration Act of 1917, but a summary of the history of the Japanese people during the last five or six hundred years by George Kennan, the distinguished traveler, which we take from The Outlook of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and

they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty oversea markets, and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western cost of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca, and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experience they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the Mayflower sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish Governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the King, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila

there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hideyoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions. * * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto Imperial universities with affiliated colleges and courses of instruction in ethics, law, history, and mathematics. The oldest university in Europe, that of Salerno, Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uraga Bay.

"Even in the field of material achievement, the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strong intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * * "

In connection with the voyages to South America more than three hundred years ago, alluded to by Doctor Grif-

fis—and there are some indications that there was a line running to South America at that time—it is worth noting that the only line now running from the Orient to South America is Japanese, a fact commented on by Bingham in "The Monroe Doctrine," pp. 90-95, and in this connection Kawakami gives the Japanese in South America in 1910 as 21,878, of whom 15,462 are in Brazil and 5,428 in Peru.

VIII.

The Japanese Are Assimilable.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable" (Senator Phelan, p. 284; Senator Works, p. 228). This means that it is impossible for them and undesirable for us to have them adapt themselves to western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to western civilization. The first article of the Perry treaty of 1854 declares:

> "There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of western civilization, shall the Japanese be forbidden to eat it? In view of the last sixty years, the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to

these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the south, or the Oriental in the west? In art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation to western methods. In religion, Buddhism and Shintoism have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, pre-eminently American. Section 2169 authorizes the naturalization of black men, but half the States forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly of the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he

lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the habits, attitude towards the world, and the Constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the army and navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1,780 independent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1,002 out of 2,178, 46 per cent.—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent., excepting those classified in the Report as "whites" (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the "whites" would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent. of the population, have but 13.31 per cent. of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the Juvenile Court, there were only 54 Japanese, or 9 per cent., whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the Chief Justice to the legislature), there are 1,794 convictions of "whites" (including Portuguese),

with an estimated population of 35,322, to 1,686 convictions of Japanese. In other words (gambling aside), there are three "white" convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the records of the Circuit Courts of Hawaii, in the same report of the Chief Justice, it appears that in 1916, 379 divorces were granted in the Territory, 193 of which were Japanese, but 8 per cent. larger than the percentage to population. This result should be surprising to one who is not familiar with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years the honored head of the High School in Honolulu and known to every student of the Japanese, and the recipient of especial recognition by the Japanese Government for his studies of the Japanese, says of their racial origin and assimilability, in a memorandum summing up what he has published at various times:

> "The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characters of the Japanese, all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsignh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as any one may observe who travels from the extreme north to the extreme south of their elongated Empire.
>
> "I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese Government, for ten years from 1871 in their service in establishing a system of

elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers, as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzal, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of government and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea, they borrowed from China and Korea letters, literature and the art of porcelain making.

They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854, treaties and communications with Western Nations have enabled the Japanese to assimilate science, industries, commerce, and politics with a rapidity that no other nation has ever shown. Their students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

IX.

No race but the Chinese being excluded from naturalization, the root stocks and the dominant strain of the Japanese being of the white race and being "free," the petitioner can not be excluded on the single ground that he is "one of the Japanese race, born in Japan."

If Section 2169 is applicable, we have shown that it deals with individuals and not with races; that if construed in its original acceptation it means one not of the black race; that like the Polynesian, who are descended

from the anicent Japanese, they speak an Aryan tongue and are of the Caucasian race; that the southern Japanese are certainly of the Mediterranean race from which we spring; that while the Japanese are more or less a mixed race, the dominant type is still Caucasian; that they are a people against whom the naturalization and immigration laws of the United States have never discriminated, and whose fitness for citizenship has never been denied; and that it imputes legislation inconsistent with the policy of the United States expressed in its treaties and its laws and a course of action beneath the dignity of Congress to imply that the Japanese as a race have been excluded by indirection and by inference.

Conclusion.

It is due to the court to say that we have inserted as part of our argument the opinions of scientific men not readily accessible in standard works, but this we have done to give the court the latest views of science on the race origin of the Japanese, a race origin in which they are intimately connected with the Polynesians, and the standard works furnish no adequate discussion upon the point in question, the materiai for the decision of which is now being collected by the men from whom we quote.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that they were among the undesirable and outcast of earth.

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